

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE CARLA L. BALDWIN, MAGISTRATE JUDGE
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5 TESLA, INC., a Delaware :
6 corporation, :
7 Plaintiff, :
8 :
9 -vs- :
10 :
11 MARTIN TRIPP, an :
12 individual, : No. 3:18-cv-296-LRH-CLB
13 Defendant. :
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22 :
23 :
24 :
25 :
: December 13, 2019
: Reno, Nevada
: Counterclaimant,
: -vs-
: TESLA, INC., a Delaware
: Corporation,
: Counterdefendant.
:

TRANSCRIPT OF TELEPHONIC MOTION HEARING

APPEARANCES:

FOR THE PLAINTIFF: WILLIAM M. FISHBACH, III
Attorney at Law
Phoenix, Arizona

FOR THE DEFENDANT: SEAN P. GATES
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Transcribed by: Margaret E. Griener, CCR #3, FCRR

1 RENO, NEVADA, FRIDAY, DECEMBER 13, 2019, 9:00 A.M.

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4 THE CLERK: This is the date set for a
5 telephonic motion hearing in case number 18-cv-0296-LRH-CLB,
6 Tesla, Inc., versus Martin Tripp.

7 Present telephonically on behalf of the
8 plaintiff, Sean Gates. Present telephonically on behalf of
9 defendant, William Fischbach.

10 THE COURT: Good morning, everybody.

11 We are here for our motion hearing related to
12 the motion to compel for Mr. Musk's deposition.

13 Let me start by telling everybody what I have
14 reviewed in preparation for today's hearing.

15 First, I went over the complaint at docket
16 number 1, the answer and the counterclaims at docket 27, the
17 transcript of the December 3rd, 2018 hearing at docket 102,
18 the motion -- defense motion to depose Mr. Musk at 107 and all
19 the exhibits attached thereto, which I think some are
20 duplicated with other things I've reviewed already,
21 plaintiff's opposition at 112, the reply brief at 119. I also
22 reviewed the motion to seal that defendant filed in connection
23 with the motion for the deposition at 108, the opposition at
24 114, and the reply brief at 120.

25 So let me start with this. On the motion to --

1 well, actually -- yes, I'll start with the motion to seal.

2 It's my understanding that Mr. Tripp's position
3 is that nothing should be confidential, and, in fact, that the
4 motion to seal was filed because of partial -- partially
5 because of the issue with the protective order and the marking
6 of some of these exhibits that were attached that were, in
7 fact, under the protective order.

8 In Tesla's opposition, they have requested that
9 two -- basically two items that they believe should be sealed,
10 first, exhibit number -- or Exhibit N, which is a private
11 e-mail strain of communications, and then also in Exhibits L
12 and M, the names and private e-mail addresses of nonparties
13 and who are also not Tesla employees, and then also, to the
14 extent that those are sealed, then, any reference specific to
15 those particular items in the motion itself.

16 Mr. Tripp's reply brief essentially argues that
17 the standard for sealing has not been met and therefore these
18 items should not be sealed.

19 Did I -- let me start with Mr. Tripp. Did I
20 state your position correctly, sir?

21 MR. FISCHBACH: You did, your Honor.

22 THE COURT: Okay. And, Mr. Gates, did I state
23 Tesla's position correctly?

24 MR. GATES: You did, your Honor.

25 THE COURT: Okay. I don't believe I need any

1 further argument, but I do want to give both of you the
2 opportunity, if you would like, to make a record on anything.

3 So I'll start with Mr. Fischbach. Is there
4 anything else that you would like to put on the record, sir?

5 MR. FISCHBACH: Not unless you have any
6 questions.

7 THE COURT: Okay, perfect.

8 Mr. Gates?

9 MR. GATES: The only thing I would say, your
10 Honor, is that we also have, as part of the opposition, the
11 declaration of Austin Marsh that lays out the reasons why the
12 material should remain sealed.

13 One is just to protect the privacy of the
14 individuals who aren't involved in the case in Exhibits L and
15 M, and then Exhibit N is -- also has to do with Tesla's
16 internal public relations strategy, their consulting --
17 communications with a consultant.

18 THE COURT: Okay. Thank you very much.

19 So I have reviewed everything, and, as has been
20 stated, the presumption is that court records are, in fact,
21 available for public view under the First Amendment, and
22 therefore, for an order to seal records to be granted, there
23 must be a compelling reason for sealing the records from
24 public view, and the sealing order must also be generally
25 tailored to only seal those matters that require the

1 protection.

2 As stated in Mr. Tripp's, I believe, reply
3 brief, certainly there is some case law that's developed
4 around dispositive and nondispositive motions. However, that
5 standard, based on some case law, seems to be a little bit
6 influx, and therefore this idea that a lower standard of good
7 cause is sufficient or not sufficient, to be totally frank,
8 after reviewing the documents and the arguments by the
9 parties, I find that there are compelling reasons. So even at
10 the higher standard, I agree with Tesla that the items that
11 they have requested to be sealed shall be sealed.

12 Starting with the Exhibit N issue, I agree that
13 the communications within the internal corporate strategy
14 related to the public relations should be sealed specifically
15 because, although some of that e-mail strain appears to relate
16 to this case, it also relates to various other items that are
17 totally unrelated, and, in fact, could be, I think, you
18 know -- I don't think that's appropriate for them to be made
19 public under the circumstances.

20 And because they do include strategic
21 communication and things of that nature, I do find that there
22 is a compelling reason for those to be sealed, and sealing
23 only that exhibit and references to it, I believe, is narrowly
24 tailored under the required rule.

25 As to the private names and e-mail addresses, I

1 agree, I believe that there are privacy interests related to
2 these individuals regardless of whether they may or may not be
3 public e-mails or individuals that may or may not be already
4 known. I don't believe that people that are not parties to
5 litigation and who have -- you know, don't have any interest
6 in the litigation, that their personal information should be
7 protected and redacted, and we certainly have a slew of rules
8 that require that type of protection. Although e-mail
9 addresses I don't think are specifically identified, they
10 certainly fall within the personal and private information
11 that we generally consider to be private.

12 And so, for those reasons, I will seal the
13 motion, or those items that has been requested by Tesla, and
14 then I would simply ask that a redacted version of the motion
15 be filed with the appropriate redactions and then the sealed
16 items, so that way this motion is on the public record.

17 Is there any question about that, Mr. Fischbach?

18 MR. FISCHBACH: Judge, I would just -- to the
19 extent the motion references any of those exhibits, I believe
20 what is referenced is not within kind of the realm of what
21 Tesla's concern is about a public relations strategy.

22 I appreciate that there are things in those
23 e-mails that, because it was kind of a (inaudible)
24 conversation, it would go to Tripp and then other things, but
25 I don't believe there's anything in the motion that, to the

1 extent it references those exhibits, touches on the concerns
2 that Tesla has. It certainly doesn't reference e-mail
3 addresses, doesn't identify anybody by name who is not a party
4 to the litigation. Anything that's quoted from those exhibits
5 is directly relevant to the issues in this case.

6 THE COURT: Okay. Let me --

7 MR. FISCHBACH: So I would just --

8 THE COURT: Let me ask Mr. Gates.

9 Mr. Gates, do you have a problem with that? I
10 tend to agree. To the extent that the e-mail chain is related
11 to this case, I don't see why it needs to be sealed in the
12 motion itself.

13 MR. GATES: No, your Honor. I did not go
14 through their motion to try to figure out what exactly would
15 be redacted. It's probably true that nothing needs to be
16 redacted out of the motion, but I just can't say without going
17 back and taking a look at it.

18 THE COURT: Well --

19 MR. GATES: I don't --

20 THE COURT: Why don't you maybe meet and confer
21 privately?

22 MR. GATES: We can meet and confer on that.
23 This will take us 5, 10 minutes to figure out.

24 THE COURT: Okay. Well, what we can do is, at
25 the end of this hearing, maybe you all can just get on the

1 phone together and meet and confer, and maybe we could call
2 you about 15 minutes later and make sure if there's any
3 issues, that we could resolve it on the phone if there are any
4 issues between the parties.

5 MR. GATES: That would work, your Honor.

6 THE COURT: Okay. We'll get to that at the end
7 then.

8 Let me start now -- moving to the motion for --
9 related to the deposition. First of all, Tesla filed a
10 motion, a surreply, on December 10th of this -- earlier this
11 week, I guess. I lose track of time. I had an all-day
12 settlement conference with an inmate yesterday so I'm not
13 going to lie, I'm a little bit -- a little bit frazzled.

14 So, anyway, I denied that motion at the minute
15 order at docket number 124, but I wanted to explain my
16 reasoning behind that to some extent because I think it's
17 important and I think it's relevant to the extent that there
18 would be any type of argument that either party would like to
19 make today on the call.

20 First of all, the reasoning for the -- and the
21 purpose behind the surreply really boiled down to two
22 arguments; first, that in the reply brief Tripp quoted from an
23 extensive deposition transcript related -- or quoted from a
24 transcript from a prior case management conference, but,
25 according to Tesla, had not quoted all of the language

1 relevant to that particular case management conference and
2 what the Court had actually said in relation to this issue.

3 And, secondly, Tesla argued that, in the reply
4 brief, Tripp had raised for the first time arguments related
5 to a deposition transcript of Mr. Musk in another matter, and,
6 for those two reasons, Tesla felt that it was important to
7 raise these issues with the Court and provide a surreply.

8 I denied the surreply because basically it was
9 unnecessary. First of all, I had already read the transcript
10 and, quite frankly, I remembered the transcript, and I knew
11 that later in that hearing I had reserved my ruling ultimately
12 on whether or not I would allow this which is why we even have
13 briefing in this case.

14 So I appreciate the issue with Tesla, but I was
15 aware of it so there was no need for a surreply on that, and,
16 secondly, when I read the reply, I was already fully aware
17 that arguments made related to that deposition were not raised
18 from the first motion, and therefore, under the case law in
19 this district and under my following of that case law, I will
20 not consider issues raised for the first time in a reply
21 brief.

22 And so, again, it was unnecessary for that
23 because I had already intended to make a record that I would
24 not be considering that argument. So I appreciate Tesla's
25 surreply, but, as I stated, I denied it because I did not

1 believe it was necessary to file it.

2 Secondly, for purposes of clarification, to the
3 extent that there would be argument here today, I want both
4 parties to be clear that I don't want argument on those issues
5 because they've -- as I've already stated, I'm fully aware of
6 what was stated at prior case management conferences, but,
7 more importantly, I'm not going to consider arguments related
8 to issues that were not raised in the motion itself.

9 More importantly, I've also read, and I'm very
10 familiar with, all of the papers. So to the extent that
11 either of you would like to make oral argument, I would like
12 it -- for you to -- if there's other arguments or other issues
13 that you would like to raise, that you feel that you need to
14 clarify or something like that, that's fine, but I would
15 simply ask that you not reargue your motion.

16 And so, with that, is there any question,
17 Mr. Fischbach, on that issue?

18 MR. FISCHBACH: Judge, I just would like to
19 clarify that the issue about the length of Mr. Musk's
20 deposition was something that was raised in Tesla's response
21 brief. They took issue with our initial proposal of four
22 hours, and then --

23 THE COURT: Well, I'm not going to argue the
24 surreply and the appropriateness of a surreply that I already
25 denied. So is there anything else that you need to raise?

1 MR. FISCHBACH: No, Judge. Unless you have any
2 questions for me, I believe we covered everything in the
3 briefing.

4 THE COURT: Okay. Mr. Gates, is there any -- so
5 do you not want to make any argument in addition to that on
6 the deposition issue, Mr. Fischbach?

7 MR. FISCHBACH: Well, Judge, I don't want to
8 rehash the same arguments, but I -- to the extent I feel the
9 need to make a record, it's -- this is not a circumstance
10 where the apex rule would apply. Mr. Musk is the tort feisor.
11 We are -- and he is an appropriate party or witness to depose
12 given his direct involvement in this case, and I don't even
13 think the apex rule applies. It's just a matter of whether or
14 not his deposition is within the scope of discovery, and I
15 think we certainly made a record as to why that is.

16 THE COURT: Okay. Thank you very much, sir. I
17 appreciate it. I don't have any questions for you.

18 Mr. Gates, is there anything further that you
19 would like to argue or anything that you would like to make a
20 record on?

21 MR. GATES: Yes, your Honor, if I may.

22 Let's start out, Mr. Musk is not the tort feisor
23 in this case. Tesla is the defendant. I did not add
24 Mr. Musk. He's not a personal defendant.

25 So what it comes down to, as I understand from

1 the reply brief, is that Mr. Tripp believes that he is
2 entitled to a deposition of Mr. Musk because -- about his
3 motives for making the statements and knowledge of the facts,
4 and I just -- I don't think they've justified a deposition,
5 let alone a four-hour deposition, and certainly not a
6 seven-hour deposition on that, but -- and let me tell you why,
7 your Honor.

8 As you kind of indicated in the beginning, you
9 directed Mr. Tripp at the CMC to obtain by discovery, through
10 less intrusive means, whatever he needed -- he thought he
11 needed from Mr. Musk because that may obviate the need for a
12 deposition.

13 You said, for example, that if he serves RFAs,
14 and you get an admission, you may not need a deposition at
15 all, and on these issues the motives, the kind of subjective
16 mental state, as Mr. Tripp has phrased it, he just didn't do
17 the right -- he didn't do the discovery. There's no
18 interrogatories on Mr. Musk's motives. He didn't serve any
19 requests for admissions to say admit you did this because
20 you're trying to vex or harass Mr. Tripp, he didn't depose
21 some key witnesses.

22 Their theory is that Mr. Musk was out to destroy
23 Mr. Tripp, had some kind of vendetta or something like that.
24 Well, there were people who were in communication with
25 Mr. Musk about Mr. Tripp, and if he were really out to destroy

1 Mr. Musk [sic], they would have heard something or seen
2 something that would have indicated his -- this state of mind
3 issue, whether he had a motive to destroy, and those are
4 Mr. Sam Teller who is in the office of the CEO who was
5 identified in our interrogatory responses. Mr. Teller is the
6 one who likely told Mr. Musk about the threat to the
7 Gigafactory, and so he communicated the facts to him. They
8 didn't depose him. They obviously didn't ask him any
9 questions about how did he react, was he upset, things like
10 that.

11 Mr. Jeff Jones, who was the head of security at
12 the time who was reporting to Mr. Musk about the
13 investigations and what Mr. -- they had found about Mr. Tripp.

14 Christian Krikericks (phon) who is the person
15 who was on the phone, or, excuse me, who sent the instant
16 message about the threat to the Gigafactory while the caller
17 was on the phone saying that Mr. Tripp was heavily armed and
18 headed to the Gigafactory.

19 They didn't take any of those. They didn't take
20 a 30(b)(6) witness. They could have put in another topic that
21 said, you know, what was your motive --

22 THE COURT: I don't believe that's accurate.
23 It's my understanding that there was a 30(b)(6) witness that
24 was actually deposed.

25 MR. GATES: There was a 30(b)(6) witness on two

1 topics, your Honor, one was the threat to the Gigafactory, and
2 the second was the scrap numbers.

3 On the threat to the Gigafactory, that witness,
4 they just -- they didn't ask, you know, what was the
5 motivation, what was Mr. Musk's motivation for sending the
6 e-mail to *The Guardian*. They didn't -- and use our 30(b)(6)
7 witness so that would have been a fair --

8 THE COURT: Well, how would a --

9 MR. GATES: -- question.

10 THE COURT: Wait, wait, wait, wait, wait. So
11 here's the problem with your argument, and I'm going to cut
12 you off with this argument because I'll tell you right now I
13 don't buy it.

14 MR. GATES: Okay.

15 THE COURT: How would a 30(b)(6) witness be able
16 to testify to the subjective motivations of someone else?

17 MR. GATES: If they had --

18 THE COURT: How would they have personal
19 knowledge, or knowledge through the company, of the subjective
20 motivations of someone within the company that was making
21 statements?

22 MR. GATES: So what this goes to, your Honor, is
23 kind of the argument that, well, because it's his subjective
24 motives, only Mr. Musk can know about that, and that's the
25 only way to get discovery about it is at deposition, and

1 that's exactly kind of the case of *Affinity Labs* which
2 rejected the proposition -- *Affinity Labs* was a case against
3 Apple. They wanted to depose the CEO, Steve Jobs.

4 THE COURT: And is that controlling authority?

5 MR. GATES: On eight --

6 THE COURT: Is that controlling authority?

7 MR. GATES: No, it's not, your Honor. It's from
8 the North -- it's persuasive. It's from the Northern District
9 of California, but I think it's kind of right on point,
10 because Mr. Jobs -- there were 18 statements. They wanted to
11 take the deposition of him because the argument was he made
12 the statements and therefore, by definition, he has firsthand
13 knowledge of what he meant by the statements, so basically
14 what was his subjective understanding of the statements.
15 Again, it's the subjective mental state, that's what they're
16 trying to get at.

17 And the Court in that case denied the deposition
18 because, on seven of the statements, they had not taken
19 discovery, and, on the other 11, they either got what they
20 needed from other witnesses, or they failed to use less
21 intrusive means such as interrogatories or RFAs.

22 So the case law -- we cited a number of other
23 cases where a CEO had made a statement, *Salter versus Upjohn*
24 was testimony to the United States Congress, *Thomas v IBM*
25 was -- the chairman actually wrote the policy that they were

1 challenging that they claimed was discriminatory. So the fact
2 that a chairman made the statements doesn't automatically
3 create the possibility of deposition. They still have to try
4 to get the -- get the facts through other means.

5 And they could have -- just for example, they
6 deposed Mr. Jacinto who was the one who, as we set forth in
7 our interrogatory responses, and he explained in the
8 deposition, was the one who reported to Mr. Musk about -- that
9 Mr. Tripp had stolen the confidential information and shared
10 it with a reporter.

11 And they didn't just ask him simple things like
12 how did he react when you told him about that, it was, was he
13 upset, did he curse, did he swear vengeance, did he say
14 anything to you suggesting he was motivated to harm Mr. Tripp,
15 and then for those who talked to Mr. Musk after the
16 statements, did Mr. Musk express any -- the reasons why he
17 made the statements.

18 They just didn't ask those kind of questions,
19 and that's exactly the type of discovery that you had directed
20 them to obtain in the CMC and is what's required under the
21 case law.

22 So, you know, it's like you can't avoid -- you
23 know, you can't just -- what they seem to have done is say,
24 well, Mr. Musk is the one who can only talk about his
25 subjective state of mind, so we're not going to ask anybody

1 else about it, and then to give them a deposition is kind of
2 rewarding their not doing exactly what they were told to do
3 and what the case law requires.

4 So that's why we don't think that they're
5 entitled to a deposition, your Honor, because they didn't do
6 the kind of homework that you gave them or the homework that's
7 required under the case law.

8 THE COURT: But you don't dispute the fact that
9 Mr. Musk was personally involved in this case, correct?

10 MR. GATES: No, he was the one who made two of
11 the statements and sent the e-mail to the reporter. I'm not
12 denying that, but the case law --

13 THE COURT: But wasn't there a tweet? We had a
14 tweet about whether or not --

15 MR. GATES: Yeah, that's one of the two --
16 that's a -- there's an e-mail to the employees, there's a
17 tweet, and then there's an e-mail to a reporter so --

18 THE COURT: But there was also an e-mail train
19 directly between Mr. Musk and Mr. Tripp the day that -- the
20 day that the lawsuit is filed where they banter back and
21 forth, and he uses one of those e-mails as what he sends then
22 to a reporter to support this idea that Mr. Tripp is volatile,
23 that he's dangerous, and that he's the one that's the threat
24 to the company, right?

25 MR. GATES: He forwarded the e-mail to the

1 reporter, that is correct.

2 THE COURT: From the e-mail train between
3 himself and Mr. Tripp.

4 MR. GATES: Yes, he did, no denying that. But
5 like I said --

6 THE COURT: Wait. Well, one thing I find
7 particularly concerning is his own declaration where he says
8 at paragraph number 7, page 3, that,

9 "I posted the tweet referenced in paragraph
10 67" of the complaint and counterclaim "which asked
11 Linette Lopez whether she had paid Mr. Tripp. As I
12 stated, I did not personally conduct the
13 investigation...that it was performed by Tesla's
14 security team." And then it says, "My questions to
15 Ms. Lopez were prompted by information provided to me
16 as a result of that investigation."

17 That alone I believe is a reason for him to be
18 deposed because he's talking about why he did something
19 because of information provided to him by others within the
20 company. So what information was that, and how at all would
21 someone be able to get that through other means during
22 discovery?

23 MR. GATES: On the tweets, that's referring to
24 the tweet, your Honor, they actually didn't serve any written
25 discovery on the tweet. There was no interrogatory, no

1 request. And, like I said, a simple interrogatory could have
2 been what were the reasons why or what were the purposes of
3 sending the tweet. They didn't even do that. So we don't
4 know what they would have obtained if they had done that.

5 They did depose the investigators who -- the
6 ones who provided the information to Mr. Musk. They have the
7 information about what was provided to Mr. Musk because --

8 THE COURT: Yeah, but they can't find out from
9 them what part of that information prompted him or gave him
10 concerns. They only can say what they told him, that only
11 Mr. Musk can explain what it was about the information he
12 received that prompted him to do what he did. Right?

13 MR. GATES: Okay. Well, that -- that -- that
14 goes back to exactly the issue in *Affinity Labs* which was the
15 argument that, by definition, Mr. Jobs is the only one who
16 could know what he meant about the statements, and in that
17 case the Court, nonetheless, denied a deposition because the
18 plaintiffs had not taken the requisite prior discovery.

19 On seven of the statements they didn't take any
20 discovery, just like Mr. Tripp didn't take discovery on these
21 tweets. On the other 11, the Court found that they either
22 didn't -- they got what they needed from other witnesses, or
23 they failed to use less intrusive means. So it's completely
24 analogous to what we have here, your Honor.

25 I understand the -- the kind of initial reaction

1 is, well, how can we know what is in his head, only he can say
2 that, but, under the case law, you try to get the discovery
3 through other means.

4 And people share what's in their head. You
5 know, if he's really mad and he really has this plan to
6 destroy Mr. Tripp, I mean, he's probably going to say
7 something to somebody, and they just didn't ask those
8 questions.

9 THE COURT: Okay. Any other argument, sir?

10 MR. GATES: Well, your Honor, if you're inclined
11 to grant the motion, then I would ask that there be some
12 limitations on it, especially with regard to some of these
13 extraneous issues that they seem to be focused on.

14 So under the case law, if there's a deposition
15 of an apex witness, what the courts do, and you can look at
16 the cases --

17 THE COURT: I'm familiar with what the courts do
18 so -- yeah.

19 MR. GATES: Okay. So then we need some
20 limitations here because we -- there's some indications that
21 they want to take discovery that's very, very far afield, and
22 basically what they're looking for, your Honor, is, frankly,
23 it sounds to me like a character witness.

24 What they want to do is, you know, ask him
25 questions about every spat or every statement he's made about

1 someone who is supposedly a critic of the company, and, you
2 know, that is just simply improper character evidence.

3 They're trying to say that -- what they say
4 is -- the fact that he has made statements about other
5 supposed critics, quote, this is in the reply brief, "bears
6 directly on Musk's motives and willingness to tarnish Tripp's
7 reputation."

8 That's just asking for supposed evidence of
9 character and acts in conformity of character, and that's not
10 permissible under FRE 404. It can't be the basis -- it can't
11 say, well, we need to know his motive here because, under 404,
12 you can only get evidence of prior acts for the basis of
13 motive if there's some logical basis to explain how the prior
14 acts provide a motive for the action here.

15 So it -- you know, why was he -- what was his
16 motive to carry a false -- this is an example of how it works,
17 what was the defendant's motive to carry a false ID. Well, he
18 robbed a bank. Okay. So we get in the fact that he robbed
19 the bank to show that he had a motive to carry a false ID.

20 Here there's no logical basis between -- just,
21 for example --

22 THE COURT: I'm going to just cut you off
23 because I already agree with you, sir, and --

24 MR. GATES: Okay.

25 THE COURT: -- I'm very familiar with the rules

1 of evidence, and so to the extent, if I am inclined to do
2 this, I absolutely agree that limitations need to be put on
3 there, and I fully appreciate the objections and arguments you
4 have on that. Is there any other arguments that you would
5 like to make?

6 MR. GATES: The last is just, your Honor, that
7 if it's really about, frankly, his motive and his knowledge of
8 the facts that led him to make the statements, that can be
9 done in 30 minutes. I mean, that's a really -- there's not a
10 lot of topics there so --

11 THE COURT: Well, I'm not sure that it's just
12 limited to his -- I think it's limited to his involvement in
13 investigations. It's going to be -- will be related to his
14 knowledge of the extent of those investigations, what
15 information was being transferred from him to others and
16 vice-versa as it related particularly to some of the comments
17 that were made after Mr. Tripp was interviewed and things like
18 that.

19 So I don't think it's just limited to just the
20 tweet or just the e-mail. I think there are some other
21 parameters around what was happening that underlie all of
22 those questions if I'm inclined to grant the motion.

23 So I'm not sure that it's quite as limited as
24 you're indicating, but I appreciate and I agree there will be
25 limitations both in scope and in time.

1 But I'd like to hear from Mr. Fischbach and his
2 response, and particularly, Mr. Fischbach, what I would like
3 you to focus on is that I think Mr. Gates makes some very good
4 arguments, and also arguments are well taken, with respect to
5 what discovery did you do that would have provided you this
6 information, or what is it about the information that you
7 could not get through other discovery, and just focus on that,
8 sir, if you could.

9 MR. FISCHBACH: Yes, Judge. I did the
10 depositions of both of -- and pardon my voice, I'm a little
11 under the weather right now.

12 But I deposed Mr. (Inaudible - feedback noise)
13 and Mr. Nocon (phonetic) who was the other investigator, and I
14 asked them about conversations they had with Mr. Musk, and
15 they were always very nonspecific, "yeah, I had some
16 conversations," they couldn't remember. So it's just simply
17 not true to say that we didn't address those questions in
18 deposition. They got very nonspecific responses.

19 Additionally, Tesla has ensconced its entire
20 investigation, at least with respect to e-mails and internal
21 communications, in attorney-client privilege. So while we
22 have been permitted -- or we've deposed witnesses on their
23 personal knowledge of what went on, we were not able to get
24 e-mails, internal memoranda things like that, that also might
25 have been helpful to us in that regard because of Tesla's

1 obstructive use of attorney-client privilege.

2 And we did submit written discovery on this,
3 Judge, I attached it to my reply. And I think you practiced
4 long enough, Judge, both on the bench and before you assumed
5 the bench, that written discovery, particularly
6 interrogatories, have limited utility. You --

7 THE COURT: That's a very kind way of putting
8 it.

9 MR. FISCHBACH: But, you know, there's all these
10 objections, and the responses are limited, and, you know, I've
11 gotten to the point where I've found the best way, you know,
12 to gather evidence is either in documents or in deposition
13 testimony because both of those speak to themselves.

14 So we did conduct extensive discovery, Judge. I
15 think we deposed something like 12 or 13 different Tesla
16 personnel to include a 30(b)(6) witness on the Gigafactory and
17 Tesla's statements in response to that threat.

18 In terms of the idea that we're there to harass
19 Mr. Musk or anything like that, I mean, I would hope the Court
20 would know better than that. I think you've seen counsel
21 conduct themselves very -- on both sides conduct themselves
22 very professionally in this case. We just want to conduct
23 discovery, Judge, on claims that Mr. Tripp brought in this
24 case.

25 With respect to 404(b), Judge, I mean, one of

1 two big exceptions to 404(b) is you can bring in other bad
2 acts to prove evidence of motive, opportunity, intent, things
3 like that. So, you know, we do think those are areas that can
4 be explored even to the extent they might touch on other bad
5 acts because that's a very well-known exception to 404(b).

6 I don't know if you want to get to the time
7 limitation or want to get to that later, Judge.

8 THE COURT: Well, I think that -- you know,
9 initially when I was going to come on the bench today my
10 intent, I thought, was just going to be to take this under
11 submission and to draft a written document. But, you know, as
12 I sit here today and I think about this, I don't know that
13 that's necessary, nor do I think it's really productive
14 because I think the parties need direction and to be able to
15 get a decision so that things can move along as are necessary.

16 Let me start first with this. Let me start with
17 the law of false light in Nevada because I think it's
18 important to understand why these issues may matter.

19 When we talk about the law of false light, and I
20 point to this case, although the case has actually been
21 withdrawn by the Nevada Supreme Court, but because it was my
22 case, I am particularly familiar with the Nevada Supreme
23 Court's consideration of the tort of false light from the
24 *Hyatt versus FTB* case that actually came down -- I believe it
25 was in 2013.

1 But, nonetheless, effectively what this tort
2 says is that when a defendant publicizes a matter that places
3 a plaintiff in a false light before the public, where that
4 false light would be highly offensive to a reasonable person,
5 and where the defendant had knowledge of, or acted with
6 reckless disregard to that falsity, and it was publicized,
7 then you have someone placed in a false light.

8 One of the things that I think is important when
9 we look at the case law, and we look at what the standards
10 are, knowledge is a personal, individual issue that often is
11 involved with subjective determinations, and that actually is
12 referencing an IGT game -- *International Game Technology* case
13 from 2018 from this district.

14 And so knowledge is unique, and sometimes and
15 most likely and most often, is something that's unavailable
16 through other means of discovery other than by the person
17 involved in the specifics of a particular case.

18 And when you look at the elements of a
19 defamation claim, and, of course, the defendant made false
20 statements of fact, and that they were not privileged to
21 communicate that, and they were made to a third-party, and
22 that when the defendant made those statements, they acted
23 either negligently, recklessly, or intentionally, and then, as
24 a result of that, the reputation is damaged.

25 Now, to the extent that, obviously, if there is

1 an argument for public figure as to Mr. Tripp, which I think
2 is sort of a tentative argument at best, you know, the
3 standards may be higher, but, nonetheless, it still goes to
4 what was going on with the defendant when statements were
5 published. That is important.

6 And although Mr. Musk has not been sued
7 individually, he was speaking on behalf of the company, and
8 certainly the tweets coming from him personally, the e-mails
9 between him and Mr. Tripp personally, the e-mails to reporters
10 personally, all go to those questions and all make up part of
11 the actual paragraphs if you look at the complaint or the
12 counterclaim.

13 In specific paragraphs throughout the
14 counterclaim, Mr. Tripp is referencing statements and actions
15 taken specifically by Mr. Musk. Just looking at paragraph
16 number 23, Mr. Tripp directly e-mailed, so there's
17 conversation about the e-mails. It goes on to 25, and I could
18 go through all of those, but I don't think I need to because I
19 am very confident that both of the attorneys on the phone, who
20 I have great respect for and I know are very competent, are
21 very familiar with all of those paragraphs.

22 So this isn't a case where a CEO or a high-level
23 executive does not have personal involvement in the matter,
24 that is beyond question, and I think that's already been
25 conceded and appropriately so.

1 But then the question becomes this apex rule and
2 whether or not the Court would follow the apex rule given the
3 fact that I have not been able to locate any controlling
4 authorities specific to that from the Ninth Circuit. But,
5 quite frankly, regardless of whether I agree with it or
6 whether I would adopt a strict version of it or a more relaxed
7 version of it because different districts in different
8 circuits have interpreted it in different ways, even at any of
9 those, I believe that under the apex rule this particular
10 individual should be deposed.

11 Starting with specifically what we talk about
12 with the apex rules, obviously, that first we have to look at
13 whether that particular person has unique personal knowledge
14 of relevant information, and I believe I've already set that
15 out based on what I've already said.

16 But, secondly is whether or not that information
17 could have been found by other less intrusive means. And I
18 agree with Mr. Gates, and I do have some concern with respect
19 to this, but I also recognize -- and especially given the
20 unique elements of a false light in a defamation claim --
21 believe that this is not the type of thing that necessarily
22 could have been determined by less intrusive means, in other
23 words, the personal belief system or the personal knowledge,
24 actions and things that led to certain things that were
25 happening, particularly in light of Mr. Musk's own declaration

1 where he discusses that he took actions based upon information
2 he received during the course of an investigation, which
3 there's no way to know what exactly he's referencing to,
4 there's no way of knowing what he meant by that information
5 and how it affected his decision to make the tweet in the
6 first place, and those are all things that are highly relevant
7 and specific to paragraphs in the counterclaim that have been
8 pled in this case.

9 So with that being said, I believe that under
10 the -- even under the apex rule, Mr. Musk should and will be
11 deposed in this matter.

12 But to the extent that Mr. Gates has stated, and
13 I absolutely agree, I was very concerned just by some of the
14 attachments that I received that related to other lawsuits and
15 other depositions and other things that are going on. To the
16 extent that there will be a deposition of Mr. Musk, it will be
17 limited to this case and this case alone, what happened in
18 this case, what's specifically alleged in this case, the
19 actions taken in this case.

20 But to the extent that you would like to depose
21 him on his -- you know, his objective or his, you know, other
22 acts in other cases or any of that as it goes to, you know,
23 his credibility or any of that, those are not issues that I'm
24 going to be allow to be gone into.

25 And I'm also going to limit the amount of time.

1 I think that the four -- I think there was a letter that was
2 sent by Mr. Fischbach identifying the topic areas that he
3 wanted to depose Mr. Musk on. I believe that the first -- I
4 believe it's four are absolutely appropriate, and those are
5 the scope that this deposition will take, again, specific to
6 Mr. Musk's own personal knowledge and own personal actions but
7 not beyond that.

8 And I agree with Mr. Gates that that does not
9 require a seven-hour deposition, that I believe it can be done
10 in three hours. So rather than four hours, I will give you
11 three hours.

12 But I will say this. If there are any
13 shenanigans, Mr. Gates, by your client, he will -- I want to
14 know immediately. So if there's any behaviors of personal
15 attacks, bullying, or not answering proper questions, being
16 snarky, anything that is going to be inappropriate, I want a
17 phone call when it happens, and I will consider shutting down
18 the deposition and then having it rescheduled in my courtroom
19 for seven hours. Am I clear on that?

20 MR. GATES: Yes, your Honor.

21 THE COURT: Okay. So I hope you can take some
22 time and prep your client to make sure that he understands
23 that's not going to fly with this Court. So we're not even
24 going to go down that road.

25 And if there's any indication that those types

1 of behaviors are happening, and it's making it difficult or
2 almost impossible for Mr. Fischbach to get through a
3 deposition in the time frame that I've suggested, then I will
4 reconsider this, and that's how I will likely handle it.

5 So unless you would like to make a trip to
6 lovely Reno, I suggest that he simply answer the questions
7 that are appropriately posed.

8 Now, that comes to the question of where the
9 deposition should take place. I agree with what Mr. Fischbach
10 has already stated that counsel in this case have been
11 incredibly professional, have cooperated very well throughout
12 almost the entirety of this case. I cannot -- I've already
13 said it before and I'll say it again, how much I appreciate
14 how well everybody has gotten along and seemed to be able to
15 work through issues so I believe that the two of you can work
16 those issues out, certainly, and to make it the most
17 reasonable and appropriate and convenient to Mr. Musk given
18 his busy schedule and his circumstances.

19 So with that, is there any question,
20 Mr. Fischbach, about the scope of my order or what will be
21 allowed in this particular matter, sir?

22 Mr. Fischbach?

23 MR. FISCHBACH: Sorry, Judge, I had my phone on
24 mute.

25 THE COURT: That's okay. It's, like, oh, God,

1 don't tell me I'm going to have to say that all again.

2 MR. FISCHBACH: Judge, I just want to clarify
3 something. You stated the scope will be limited to the first
4 four topics in my September 23rd letter. The fifth topic is
5 Elon Musk's knowledge of the alleged threat to shoot up the
6 Gigafactory, including any statements --

7 THE COURT: Okay. Let me -- can you -- I
8 can't -- I don't remember -- I know that it was an exhibit.
9 Do you have the exhibit number or page that you can point me
10 to so I can look at exactly what it was?

11 Oh, here, I found it already. I believe it's at
12 page 45. The issue that I -- oh, there was more than five, I
13 apologize.

14 So the issue that I -- let me go through these.

15 Obviously, the first is fine, second, third,
16 fourth, the fifth. The sixth, only as to Mr. Tripp, not to
17 others outside of this case. So any efforts for him to
18 publicly criticize or threaten legal action, et cetera, as to
19 Mr. Tripp, to the extent that any of that happened, I don't
20 recall that it did, but I don't want this going into any of
21 these other areas.

22 And then, obviously, the last is exactly the one
23 that I wanted to prohibit because I don't want to be -- I
24 don't think that's an appropriate thing for this particular
25 deposition, and I definitely don't want you all going into two

1 hours of what happened in the Philippines or whatever place,
2 Thailand, or whatever case that was, and that was the purpose
3 behind that. Does that clarify that, sir?

4 MR. FISCHBACH: It does, your Honor, thank you.

5 THE COURT: Okay.

6 MR. GATES: Your Honor, this is Mr. Gates.

7 Just on this, I understand that the fourth one,
8 which is basically everything in the complaint and the
9 counterclaim seems reasonable, but that's not what they moved
10 on. That wasn't the -- you know, what they asked in their
11 motion, and that broadens it significantly.

12 The motion was we need, you know, his subjective
13 mental state about when he made statements, and this opens it
14 up to kind of a lot more, so I would ask --

15 THE COURT: Okay. Which one are you looking at,
16 sir? I'm sorry.

17 MR. GATES: It's the fourth, the fourth bullet
18 point.

19 Number one is the statements made about
20 Mr. Tripp, okay. E-mail communications, okay. Knowledge of
21 the investigation, that makes sense. But the fourth one is
22 basically his knowledge of, you know, every -- we have a long
23 complaint and we have a long counterclaim. So that covers a
24 lot of ground, and that's not what they claim they need
25 discovery on.

1 THE COURT: Well, what's your response,
2 Mr. Fischbach? I tend to agree that might be overbroad to the
3 extent it goes beyond really -- I mean, it goes directly to
4 the question of what his knowledge is, but going paragraph by
5 paragraph through the complaint and the counterclaim, is that
6 your intent?

7 MR. FISCHBACH: Well, Judge, you might find this
8 shocking, but, to some extent, I agree with Mr. Gates.

9 THE COURT: I don't actually find that shocking.

10 MR. GATES: We actually agree pretty often.

11 THE COURT: Yeah, I was going to say I haven't
12 necessarily seen that very often. So given that, how can we
13 limit that, sir?

14 MR. FISCHBACH: Yeah, and I think, Judge, it's
15 only to the extent the issues in the complaint tend to overlap
16 with issues in the counterclaim.

17 THE COURT: Okay.

18 MR. FISCHBACH: For example, there are
19 allegations in the complaint about Mr. Tripp kind of being
20 this corporate saboteur that, you know, went in and rewrote
21 Tesla's code and everything like that, and those allegations
22 certainly dovetailed into what ultimately became the basis for
23 the defamation and false light claims.

24 So, you know, as far as things like, you know,
25 the scrap, the 30(b)(6) -- not 30(b)(6), but the AR

1 containment 622, I don't have any intention to ask Mr. Musk
2 about those items. It's really just to the extent the
3 allegations in the complaint tend to overlap with the
4 allegations in the counterclaim, Judge, and, frankly, with
5 three hours, I mean, if I waste my time on extraneous things
6 like that, then, you know, shame on me.

7 THE COURT: Well, Mr. Gates, does that satisfy
8 your concerns?

9 MR. GATES: I mean, I totally respect
10 Mr. Fischbach, and we actually do get along quite well and
11 agree on a lot of things.

12 I would still ask that we strike that one topic
13 only because I think everything he needs is covered in the
14 other ones that you identified, your Honor, and the other ones
15 are much more specific. So then if we --

16 THE COURT: Well, the one thing I would say,
17 though -- and not to interrupt, I'm sorry, sir, but one thing
18 I would say is that the paragraphs I reviewed, the way I read
19 the counterclaim and the paragraphs contained therein really
20 are the same or really go to the items we've already talked
21 about.

22 They're simply discussing, you know, this e-mail
23 was sent on this date, or Mr. Musk did this on this date. To
24 me it seems almost duplicative and repetitive in terms of what
25 has already been ordered that he be deposed upon.

1 So I think maybe what the best way to do it,
2 Mr. Fischbach, is maybe just to tailor that to the matters
3 alleged in Mr. Tripp's counterclaim as it relates to, you
4 know, the communications and his actions, or something to that
5 effect, which I think gets you to the same place but
6 alleviates any question about it going into lots of extraneous
7 information and things like that. Would that be an acceptable
8 resolution, Mr. Fischbach?

9 MR. FISCHBACH: Yeah, I think so, Judge.

10 THE COURT: Okay.

11 MR. FISCHBACH: As long as -- I just don't want
12 to get into a scenario where I'm -- questions that are
13 relevant within the scope that you set forth here today are
14 not being answered because they also happen to -- the subject
15 matter also happens to appear in the complaint. I just want
16 to make sure that that's not going to happen because I think
17 there is some, not a lot, but there's some overlap between the
18 factual bases for both the complaint and the counterclaim.

19 THE COURT: Okay. Well, Mr. Gates, was that an
20 acceptable tailoring of that, that I just said?

21 MR. GATES: Well, to tailor it to the
22 counterclaim and the allegations about Mr. Musk's actions, was
23 that tailoring? I got it's limited -- it's limited to the
24 counterclaim.

25 THE COURT: Well, that's actually more -- I

1 think that's actually more limited than what I'm ordering
2 because it's not just his actions, it's information that he
3 may have received about the information, and some of those
4 paragraphs may go to that information. So I think --

5 MR. GATES: Yeah, okay. That's fair. That's
6 fair. But if it's the counterclaim and the information that
7 was provided to Mr. Musk in that -- as alleged in the
8 counterclaim, that makes sense.

9 THE COURT: Okay. So I think it's -- limited to
10 the counterclaim and those items related to Mr. Musk's own
11 actions or information gleaned through the investigation
12 provided to Mr. Musk, or that he took actions as a result of,
13 I think hopefully, Mr. Fischbach, that is clear in terms of
14 making sure that your concerns are dealt with so there aren't
15 going to be unnecessary objections that you're questioning
16 about things in the counterclaim that you shouldn't and
17 vice-versa. So are we all comfortable with that,
18 Mr. Fischbach?

19 MR. FISCHBACH: I think so, Judge.

20 THE COURT: Okay. Perfect.

21 All right. So, Mr. Gates, are there any other
22 objections, sir, or anything else that you would like to raise
23 or put on the record?

24 MR. GATES: The only thing I would take a shot
25 at, your Honor, I really do think he could do this in two

1 hours.

2 THE COURT: All right. Well, I'm giving you
3 three, but I appreciate that. Having been through enough
4 depositions -- and just objections alone will probably take an
5 hour so --

6 MR. GATES: Well, I don't tend to do -- I don't
7 do long objections so --

8 THE COURT: Okay. Well, I appreciate that.

9 MR. GATES: And Mr. Musk actually -- he was
10 deposed and testified in the Unsworth case, and that's not the
11 transcript that they gave to you, and if you saw that, it's
12 very clean.

13 THE COURT: Okay. Well, I'm glad to hear that,
14 and I have every expectation that everybody will behave very
15 well.

16 I do want to make clear I will be available so
17 if you could file at least something for the Court, and you
18 can do this under seal, letting me know the date and the times
19 that you'll be having this so I can block it on the calendar
20 and make sure that I am available if any major issues or
21 anything like that come up during the course of the
22 deposition, so that way you're not caught up on those types of
23 things, that would be very much appreciated.

24 Let me see. Is there anything else we need to
25 cover? Let me start with Mr. Fischbach.

1 MR. FISCHBACH: Judge, I wanted to circle back
2 to that issue of the sealing. It's never been clear to me
3 whether or not courts can seal parts of an ECF-numbered
4 document or do you redact things or --

5 THE COURT: You redact it.

6 MR. FISCHBACH: As I recall, we --

7 THE COURT: Yeah. So you would file a redacted
8 version, and then we would have the clean version that's filed
9 under seal with all of the information available to the Court.
10 I think there's actually a local rule that describes that.

11 MR. FISCHBACH: Okay, Judge. So I think what I
12 would suggest Mr. Gates and I do is we'll meet and confer
13 after this call here. Obviously, per the Court's order, we'll
14 redact Exhibits L, M, and N in their entirety.

15 THE COURT: Okay.

16 MR. FISCHBACH: And then we'll make a decision
17 as to whether or not anything in the substantive motion itself
18 needs to be redacted. And then do you want us to e-mail a
19 redacted version that the parties have agreed upon to your
20 chambers?

21 THE COURT: If you have agreed on everything,
22 then I would just go ahead and file the redacted version
23 that's not under seal, but file it.

24 I guess the question becomes would you like me
25 to just go back on the record with you, or do you want to just

1 call my chambers if there are any issues? Because I'm
2 available all day so --

3 MR. FISCHBACH: I don't expect us to have any
4 issues, Judge. I just want to get it done in a way that's
5 sufficient for everybody.

6 THE COURT: Yeah, so --

7 MR. GATES: I don't anticipate any issues
8 either, your Honor. I just need to put eyes on the motion
9 itself to make sure that -- to see if there's anything that
10 needs to be redacted.

11 THE COURT: Okay. Well, the offer stands. If
12 there is any major dispute or concern, you can just call my
13 chambers directly and let my assistant know, and then we'll
14 just get on the phone with you all and we'll get it figured
15 out. So I don't expect to get a phone call, but if it's
16 necessary, that at least you know I'm available so we can get
17 that resolved so that doesn't, you know, slow up the case.

18 Is there anything else, Mr. Gates, that you
19 would like to put on the record, or any other issues that you
20 think you need to raise with me or something I forgot to
21 cover?

22 MR. GATES: I don't believe so, your Honor. I
23 think you've covered everything well.

24 THE COURT: Okay. All right. Well, thank you
25 both so much. Again, as I've said in the past, and I'll say

1 it again, your briefing was excellent and very helpful.

2 With that -- oh, I guess -- what is the
3 discovery cutoff date at this time?

4 MR. FISCHBACH: I believe it's the end of
5 January.

6 THE COURT: Okay. Will that be a sufficient
7 amount of time to be able to get Mr. Musk's deposition
8 scheduled, or do you need -- I just don't know what his
9 schedule is going to be like and if you'll be able to get it
10 done in that time.

11 MR. GATES: I don't either. I would say because
12 he is extraordinarily busy and travels a lot, so if we
13 could -- February 28th?

14 THE COURT: That's fine with me. Mr. Fischbach,
15 do you have any problem with that?

16 MR. FISCHBACH: I don't, Judge. I just think it
17 might also impact the dispositive motion deadline as well
18 though.

19 THE COURT: Okay. And that's fair. So why
20 don't we do this. Why don't you file a stipulation to
21 continue the discovery cutoff and then any other deadlines
22 that flow from that time frame, including the dispositive
23 motion deadlines, so that way, hopefully within that next
24 month, you know, two and a half months or so, you'll have
25 enough time to get a time for the deposition.

1 Hopefully that's fair enough, and if that isn't
2 enough, then let me know. We can always get on the phone and
3 we can figure out that we need to do if it turns out that
4 it's, you know, a couple of weeks later or something like
5 that.

6 Okay. Mr. Fischbach, anything else?

7 MR. FISCHBACH: No, Judge.

8 THE COURT: And, Mr. Gates, anything else, sir?

9 MR. GATES: No, your Honor.

10 THE COURT: Okay. Thank you both so much, and
11 we will be in recess.

12 MR. FISCHBACH: Thank you.

13 MR. GATES: Thank you.

14 -o0o-

15
16 I certify that the foregoing is a correct
17 transcript from the record of proceedings
in the above-entitled matter.

18 /s/Margaret E. Griener 2/8/2020
19 Margaret E. Griener, CCR #3, FCRR
20 Official Reporter
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